No. 80-1369

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In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF SOUTH DAKOTA, PETITIONER

v.

ANDREW L. LEWIS, JR.,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In this action, petitioner State of South Dakota contends that the Highway Beautification Act of 1965 (23 U.S.C. 131) violates the "Necessary and Proper" Clause of the Constitution (Article I, Section 8, Clause 18) and the Tenth Amendment. The Act establishes, as a condition of receipt of certain federal highway funds, that states "ma[k]e provision for effective control" of outdoor advertising adjacent to the interstate and federal-aid primary highway systems. 23 U.S.C. 131(b). If the Secretary of Transportation determines that a state has not provided for "effective control" as defined in 23 U.S.C. 131(c), the state's apportionment of federal-aid highway funds will be reduced by 10%. 23 U.S.C. 131(b).

1. In 1977, following several years of litigation and negotiation, the Secretary preliminarily determined that petitioner had not provided for "effective control" of billboards. Petitioner challenged this decision and requested an administrative hearing. At the end of the administrative proceedings, the Secretary in November 1978 concluded that petitioner had not complied with the Act, and he ordered that 10% of petitioner's apportionment of federal-aid highway funds for fiscal year 1978 (approximately $4 million) be reapportioned to other states (Pet. App. iii-v).

In December 1977, while the administrative proceeding was pending, petitioner commenced this action in the United States District Court for the District of South Dakota to challenge the constitutionality of the Highway Beautification Act.[1] Thereafter, petitioner filed suit under the judicial review provisions of the Administrative Procedure Act (5 U.S.C. 701 *et seq.*) to contest the Secretary's reapportionment decision. These cases were consolidated by the district court (Pet. 4; Pet. App. ii, iv-v).

On cross-motions for summary judgment, the district court rejected petitioner's various attacks on the constitutionality of the Highway Beautification Act (Pet. App. vi-xx). The district court also found ample evidence in the administrative record to support the Secretary's determination that petitioner had not provided effective control of outdoor advertising (*id.* at xxiv-lv).[2] Accordingly, the court

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[1]Petitioner also brought a separate action disputing the Secretary's reservation of the funds in question pending resolution of the outstanding issues. Both the district court and the court of appeals sustained the Secretary's position (Pet. App. iv, lxi). See *South Dakota* v. *Adams*, 587 F. 2d 915 (8th Cir. 1978), cert. denied, 441 U.S. 961 (1979).

[2]In addition, and notwithstanding petitioner's references to the opinion of the hearing examiner (Pet. 4, 10), the district court expressly found that petitioner "ha[d] exhibited some reluctance to comply with the provisions of the Highway Beautification Act" (Pet. App. iii) and that its "action [did] not comport with a 'good faith attempt' to comply" (*id.* at lii). See also *id.* at iii-iv, xvi, lii, lxi.

entered judgment for respondents in both cases (*id.* at xxi-xxii, lvii-lviii).

On petitioner's appeal, the court of appeals, having "carefully studied the record in these cases," concluded that there was "no merit to [petitioner's] arguments" and affirmed "on the basis of [the district court's] detailed and well reasoned opinions * * *" (Pet. App. lxii). The court of appeals subsequently denied rehearing (*id.* at lxv).

2. Petitioner seeks review of the lower courts' holdings that the Highway Beautification Act does not violate the "Necessary and Proper" Clause of the Constitution or the Tenth Amendment.[3] However, the decision below is correct and is not in conflict with any decisions of this Court or the other courts of appeals. Further review is therefore unwarranted.[4]

The Highway Beautification Act was designed to control "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system * * * in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. 131(a). As the district court correctly concluded (Pet. App. lx-xi, xiv) and as petitioner has conceded (8/20/79 Tr. 31, 35), these are legitimate national objectives that are well within the constitutional authority of Congress.

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[3]As respondents pointed out in the court of appeals (Br. 17-18), petitioner did not raise the issue of the "Necessary and Proper" Clause in the district court, and therefore it was not properly presented for appellate review.

[4]We note that petitioner subsequently instituted effective control of billboards and is in compliance with the Act. Hence, only funds for fiscal year 1978 are at stake here (Pet. App. v-vi, xi n.4, lxii).

Moreover, the means employed in the Act to achieve these legislative ends are reasonable and appropriate. Like innumerable other statutes, the Act conditions the receipt of federal funds—here, 10% of a state's apportionment of federal-aid highway funds—upon the state's compliance with federal standards that serve to ensure that the expenditure of these funds is consistent with congressional policy. Congress has the "power to fix the terms upon which its money allotments to states shall be disbursed," and "[t]he offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 143, 144 (1947). Especially since "the construction of these highways is financed almost entirely by federal funds" (Pet. App. x), the conditions imposed by the Act upon the receipt of federal funds are unquestionably a "necessary and proper" incident to Congress' spending power.[5]

This Court and the lower federal courts have consistently upheld the constitutional validity of using conditional grant programs to induce cooperation by the states with federal policies. See, *e.g.*, *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1968); *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Comm'n*, *supra*, 330 U.S. at 142-144; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585-598 (1937); *State of North Carolina* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd, 435 U.S. 962 (1978); *Florida Dep't of Health* v. *Califano*, 449 F. Supp. 274, 283-285 (N.D. Fla. 1978), aff'd per curiam, 585 F. 2d 150 (5th Cir.), cert. denied, 441 U.S. 931

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[5] It is, of course, for Congress to determine whether federal outlays are in the general welfare and to select the appropriate means to effectuate its policy choices. See *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976); *Legal Tender Case*, 110 U.S. 421, 440-441 (1884); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 412-414, 419, 421, 423 (1819).

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Nothing in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), suggests a contrary result in this case. There, the 1974 amendments to the Fair Labor Standards Act (29

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[6]The district court also stated that it was "not convinced that the conditional grant in this case is coercive" (Pet. App. xvi).

[7]The discussion of conditional grants in *United States* v. *Butler*, 297 U.S. 1 (1936), upon which petitioner relies, is of doubtful validity in light of the foregoing decisions of this Court, and in any event is distinguishable from the present case for the reasons stated by the district court (Pet. App. xii-xiii) and by this Court in *Steward Machine Co.* v. *Davis, supra*, 301 U.S. at 592-593. Petitioner also erroneously relies on *Brown* v. *EPA*, 521 F. 2d 827 (9th Cir. 1975), vacated, 431 U.S. 99 (1977), on remand, 566 F. 2d 665 (9th Cir. 1977), and *District of Columbia* v. *Train*, 521 F. 2d 971 (D.C. Cir. 1975), vacated, 431 U.S. 99 (1977). In both cases, the courts of appeals specifically recognized the authority of Congress to condition federal grants upon a state's conformity to federal standards. See 521 F. 2d at 840; 521 F. 2d at 992-993 & n.26.

U.S.C. 201 *et seq.*) were struck down because they "regulate[d] directly the activities of States" (426 U.S. at 841) and, by "speaking directly to the States *qua* States, require[d] that they [observe provisions regarding minimum wages and maximum hours for their employees]" (*id.* at 847). Thus, the invalidity in the statute was that it "would forbid * * * [certain employment] choices by the States" (*id.* at 848) and would "force directly upon the States its choices as to how essential decisions regarding the conduct of integral government functions are to be made" (*id.* at 855). In contrast, the Highway Beautification Act does not require or forbid any decisions by a state in setting its policies. Rather, the Act merely establishes conditions upon the receipt of federal funds that Congress has appropriated in furtherance of the general welfare. "There is only a condition which the state is free at pleasure to disregard or to fulfill" (*Steward Machine Co.* v. *Davis, supra,* 301 U.S. at 595), and a state may "adopt[] the 'simple expedient' of not yielding to what [it] urges is federal coercion" (*Oklahoma* v. *Civil Service Comm'n, supra,* 330 U.S. at 143-144). See also Pet. App. xi n.4, xv-xvi; *State of North Carolina* v. *Califano, supra,* 445 F. Supp. at 536 n.10; *Florida Dep't of Health* v. *Califano, supra,* 449 F. Supp. at 284; *Texas Landowners Rights Ass'n* v. *Harris, supra,* 453 F. Supp. at 1030. As the Court has noted elsewhere, "[t]here is a basic difference between direct * * * [governmental] interference * * * and * * * encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the * * * [government] attempts to impose its will by force of law; the * * * [government's] power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher* v. *Roe,* 432 U.S. 464, 475-476 (1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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